

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1129

To be argued by:
James P. Shanahan

Docket No. 77-1129

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

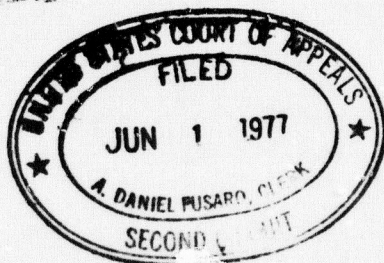
-v-

RAYMOND D. MASCIARELLI and LAWRENCE
SCHULTZ

Appellees.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEE
Lawrence Schultz



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Appellant,

-v-

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Appellees.

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STATEMENT OF THE ISSUES

Defendant Schultz will accept the Statement of the Issues as presented in the Brief of the United States of America and attempt to meet them to the end of this Court affirming the Order of Hon. Edmund Port (D.J.;N.D.N.Y.) dismissing the Indictment as to both defendants.

STATEMENT OF THE CASE

On December 10, 1974 the defendant Masciarelli was arraigned before the Hon. Edmund Port at Auburn in the Northern District of New York. Mr. Schultz, a resident of Monroe Falls, Ohio was unable to appear. He was arraigned separately on April 28, 1975 at which time I was assigned. Mr. Schultz entered a plea of not guilty and motions were returnable May 26, 1975. Subsequent proceedings led to a determination by this Court on September 26, 1975 of issues raised by the United States of America concerning the disclosure of witnesses (Docket No. 75-1201)

Sometime prior to October 4, 1976 Assistant United States Attorney Arthur A. Chalenski, Jr. advised Counsel for Masciarelli and Schultz of the recent decisions: United States v. Brodson 528 F2d 214 (7th Cir.) and United States v. Marion 535 F2d 697 (2d Cir.) As a result on November 9, 1976, and on the basis of the two aforementioned cases Hon. Edmund Port granted the motions of Counsel for Masciarelli and Schultz and dismissed the Indictment as to both men. The United States now appeals.

The one-count Indictment charges that from on or about April 12, 1974 to on or about April 24, 1974 in the Northern District of New York Raymond D. Masciarelli and Lawrence Schultz (presumably charged as a principal - although not set forth as such - 18 U.S.C. 2) utilized a telephone to transmit wagering information in interstate commerce between Munroe Falls, Ohio to Bunghamton, New York. The Indictment charges a violation of 18 U.S.C. Secs. 2 and 1084 (a).

The status of the companion case involving alleged violations of 18 U.S.C. 2, 1955 and 371 by eight defendants is that one case ended on May 24, 1977 in a conviction and the likelihood of an appeal exists; four defendants have plead; charges against another were dropped and three are awaiting trial. It was from the authorized wire intercepts in the companion case that this case was presented to the Grand Jury.

The Statement of Facts as set forth in the Brief for the United States of America are sufficient for purposes of this argument

ARGUMENT

POINT I

THE UNITED STATES DISTRICT COURT JUDGE PRESENTED WITH A WIRETAP APPLICATION AND SUPPORTING DOCUMENTS MUST MAKE A SPECIFIC FINDING THAT THE CONTENTS OF THE WIRETAP WERE INTERCEPTED CONSISTENT WITH THE PROVISIONS OF 18 U.S.C. 2517 (5) BEFORE THE INFORMATION CAN BE USED IN A GRAND JURY PRESENTATION

A. THE LANGUAGE OF THE STATUTE IS CLEAR

Title 18 U.S.C. 2517 (5) (3) provides that where a law enforcement officer intercepts wire communications relating to offenses other than those specified in the order of authorization he must make subsequent application to the Judge and the Judge in turn must make a finding that the contents were otherwise properly intercepted. The Judge must then issue an Order authorizing interceptions of wire communications relative to the newly alleged offense if the information is to be used in any proceeding held under the authority of the United States or any State or political subdivision thereof. This direction is all that we are concerned with in the case before this Court. The case agent testified to the alleged violation of 18 U.S.C. 1084

before the same Grand Jury as he presented evidence to in relation to the Companion Case involving possible violations of 18 U.S.C. 1955 and 18 U.S.C. 371 (No mention was made of 18 U.S.C. 2 although it is set forth in the Indictment (app. p.6)

The language is clear

"When an investigative or law enforcement officer ... intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval..."

Special Agent Robert R. Hazelwood makes reference to 18 U.S.C. 371 and 1955 in his affidavit relative to MP-16 (App. p.p. 78,79) The Order (App. p.p. 113-116) makes no reference to 18 U.S.C. 1084 (a) or 18 U.S.C. 2.

The Fifth Day Report (App. p.121) reference is made to conversations outside of the State of New York - from the telephone authorized to be tapped to a Monroe Falls, Ohio number. The substance of the conversations was set forth - getting the line information from Akron, Ohio; the fee and the method of communication were set forth as well as the method of

payment. On the face of the report probable cause was presented for informational purposes to the Court but nowhere in the record do we see that this information was brought to the Court's attention. The obvious way was by way of reference to 18 U.S.C. 1084 (a). This was not done.

The United States (at p.7) suggests that 18 U.S.C. 2517 (3) permits disclosure of the uncommunicated alleged crime. The United States Attorney passes over the significant provision of the subsection to suit his purpose. The first phrase of subsection 3 is controlling:

"Any person who has received, by any means authorized by this chapter..."

It is submitted that the means authorized by this chapter is contained in 18 U.S.C. 2517 (5)(3) - you must acquire the Judge's Order on subsequent application. The language is clear and the nature of the subject call can readily be placed in the unexpected category at the time of the intercept on April 12, 1974. The United States had four days to consider it and make application (the Fifth Day Report is dated April 16, 1974.) The line was represented in mid-July 1973 to have to come out of New York City.

"Rappucci informed Source I during that conversation that he gets his line from New York City"

(In mid-July 1973 (App. . . . ,
paragraph (d); also see p.51
paragraph (f)).

All parties considered this to be the source.
Now on April 12, 1974 to April 16, 1974 the subject
call is intercepted. No specific request is made of
the Court. The Indictment must fall!

B. THE PLAIN VIEW DOCTRINE

The new direction for acquiring the line was
in the plain view of the Special Agent in charge of
the case and the Assistant U.S. Attorney prior to re-
porting the five day activity to Judge Port. It
apparently involved action broader in scope than the
intrastate procedure previously employed. The pro-
cedure required was in the plain view of the Agent and
his Attorney. The entire Section (18 U.S.C. 2517)
operates from the premise that a specific procedure
must be followed - an application must be made and an
order issued in relation to the activity, allegedly
criminal in nature which there is reasonable cause to
believe is taking place. Sub-sections (1) (2) and (3)
presuppose the acquisition of an order based on pro-
bable cause before he acts in any manner. This was
not done in the instant case.

C. THE SECTIONS DISTINGUISHED

In United States v. Brodson 528 F2d 214 (7th Cir. 1975) the United States contended that 18 U.S.C. 1955 and 1084 were the same. Mr. Justice Clark rejected this position. The United States sees fit to raise the issue once again after this Court in United States v. Marion 535 F2d 697 (2nd Cir. 1976) adopted it. The United States seems to insist on the misuse of the word "relate" (Gov. Brief p.7) and obviously picks it out of the language of 18 U.S.C. 2517 (5):

"... intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval..."

The reference to "relate" is to other offenses, not as a second uncovered offense relates to the first alleged offense. The United States seems to insist on the misuse of words of art as set forth in the Statute. At page 13 the Government dares to suggest that Congress was only speaking of intercepting not in terms of subsequent use. The only way a law enforcement officer can intercept is in the manner authorized and the only subsequent use is "...the manner authorized herein."

D. 18 U.S.C. 1955 AND 18 U.S.C. 1084 ARE SEPARATE OFFENSES

Mr. Justice Clark in Brodson supra stated that

the two offenses are wholly separate and distinct. They involve dissimilar elements and require different evidence. Even though some of it might overlap because both concern illegal gambling. The Justice concludes that the Government had violated the key provision of the legislative scheme of 18 U.S.C. 2515 and did not comply with the mandate of 18 U.S.C. 2517 (5); 528 F2d at 216. In Marion at p. 705 Chief Judge Kaufman states that two federal courts, in analogous situations dismissed were indictments for failure to comply with that section were United States v. Brodson supra and United States v. Campoymiolo 168 U.S. App. D.C. 227. The sections promulgated in different decades. (1970 and 1961 respectively) and the former was enacted to combat significant illegal gambling activities within a concentrated area of the country and obviously intrastate (with an effect on interstate Commerce) while the later (and earlier statute) was promulgated to cover the broader activity of interstate communications so as to limit the activity to local areas. Once the localization was accomplished attention could be directed to the separate and distinguishable activities which are the subject of 18 U.S.C. 1955 and completely unrelated to interstate cross-country activities.

POINT II

THERE IS NO INDICATION THAT THE
SUBJECT TELEPHONE CONVERSATION
WAS DISCUSSED WITH THE DISTRICT
COURT JUDGE NEVER MIND RECEIVING
AUTHORIZATION

The Fifth Day Report in MP 16 makes reference in paragraph 6 to the subject call (App. p.121) On May 3, 1974 an affidavit is submitted to Judge Port in relation to MP 17. (App. p.123-144. Nine subjects are named (App. p.123 p.2) and six additional persons are referred to:

"...JIM (LNU), ROSE (LNU), PARKWAY (LNU), WOOD (LNU) AN unidentified male answering to the initials "BR", an unidentified female answering to the initials "BR", and others yet unknown."

The United States Attorney did not include any reference to the person (determined to be the defendant Schultz; see Government's Brief pp.4,21) speaking from Munroe Falls, Ohio.

"As a result of the intercepts on 729 - 1401, fourteen new code names have been heard in use. Thirteen names have been heard being used on the 724 - 5301. (App. p.121)

Schultz is ignored! He didn't even receive the recognition of a "BR" (see App. 123) The subsequent approval of MP 17 clearly supports Schultz's position. No reference was made to those conversations at all!

The Government's reliance on United States v. Moore 513 F2d 485 (D.C. Cir. 1975 is misplaced. 18 U.S.C. 1955 requires a violation of a State (or District of Columbia) law. It is an element of the offense. The Court stated at p. 501

"Since these same offenses were also necessary constituted elements of the federal crime of operating an "illegal gambling business", which is defined as one which is inter alia a violation of the law of the state (including the District of Columbia) or political subdivision in which it is conducted, the F.B.I. was able to join the Metropolitan Police in seeking search and arrest warrants for appellant Davis. However, the mere fact that those conversations provided a foundation for prosecution of other than D.C. Code offenses does not alter the fact that, to the extent those conversations constituted evidence of federal offenses, they also constituted evidence of the D.C. Code offenses for which authorization had been obtained".

It is obvious that all of the elements required in for an alleged 18 U.S.C. 1955 violation were intercepted pursuant to judicial approval

"... the requirement of court authorization for such use was met in this Case". 513 F2d at p.502; Gov. Brief p.22)

All of the information required for such a charge - 18 U.S.C. 1955 (b) (i) (ii) (iii) was obviously intercepted. There was nothing new. There was nothing additional.

There was no man in Munroe Falls, Ohio! United States v. Marion 535 F2d at p. 704 is clerally distinguishable and the rationale is consistent with the analysis of Moore supra.

"It is clear beyond all doubt that this federal offense was separate and distinct from the alleged state crime which formed the predecate for the original Delmonico wiretap authorization, and thus falls within the ambit of 2517 (5)

The Government's casual reference to United States v. Tortorello 480 F2d 764 (2nd Cir. 1973) at Gov. Brief p. 22 is not supportive of its position. Judge Timbers states at p. 782

"Where the electronic surveillance is to continue, and law enforcement officers wish to intercept additional communications relating to accidentally discovered criminal activity, the amendment procedure also provides an opportunity for the Court to indicate in the renewal Order that conversations relating to such Criminal activity may be intercepted."

There was no evidence of the Case Agent's investigation in the Fifth Day Report. The subscriber to the Ohio telephone was not mentioned; the indentification used by the man from Ohio on the telephone was not reported; the address where the Ohio telephone was located was not set forth; the name of the subscriber to the Post Office Box 2705, Akron, Ohio was

not sought out (or if it was, was not reported). In sum the Judge had every reason to ignore the reference in the Fifth Day Report. It's obvious that the Government ignored all of this information in its Affidavit of May 3, 1974 and its Application for MP 17. Apparently the next time any information concerning the subject calls was revealed to anyone was at the Grand Jury session. Judge Port did not permit anything in relation to the alleged 18 U.S.C. 1084 (a) violation.

POINT III

THE OCTOBER 15, 1970 AMENDMENT
OF 18 U.S.C. 2517 (3) WAS TO
EXPAND THE APPLICABILITY OF
THE SUB-SECTION RATHER THAN TO
ELIMINATE ITS APPLICABILITY TO
GRAND JURY PROCEEDINGS

House Report No. 91-1549 re P.L. 91-452, Title
IX Section 902 states:

"This section amends 18 U.S.C. 2516 by including within the list of specific offenses for which the interception of wire or oral communications under Court order is permitted the activities penalized by section 1963 above. It also Amends 18 U.S.C. 2517 to permit evidence obtained through the interception of wire or oral communications under Court order to be employed in Civil actions. (emphasis added) U.S. Code Congressional and Administrative News, 91st Congress, Second Session (1970); Legislative History. Organized

Crime Control Act; P.L. 91-452 at p. 4036.

The intent of Congress is obvious despite the language of the United States Attorney p.p. 23-29 of Gov. Brief; see specifically p. 27, line 6.

POINT IV

THE INDICTMENT WAS PROPERLY DISMISSED

As stated in the Statement of the Case the Assistant U.S. Attorney brought Brodson and Marion to the attention of Counsel for the defendants. He was commended by Hon. Edmund Port in the spirit of United States v. Berger (App. p. 45) Now he states that we have no standing to challenge the Government's procedure. Mr. Justice Clark in Brodson 528 F2d at p. 216 states that:

"Dismissal of an indictment is the ultimate sanction for the Government's failure to act properly. That drastic remedy has been approved in at least five other circuits in cases involving challenged Grand Jury evidence" and further states:

"Indeed, unauthorized interceptions and the disclosure and use of information obtained through them are denounced as crimes."

The Justice cites United States v. Tone, 329 F2d 848, 853 (2d. Cir. 1964) and Gelbard v. United States, 408 U.S. 41, 46. The reasoning and an equally severe

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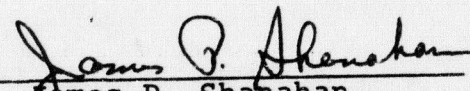
Defendant-Appellees

JAMES P. SHANAHAN, BEING DULY SWORN DEPOSES AND SAYS:

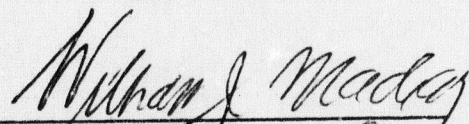
1. That he is the attorney for the defendant-appellee Lawrence Schultz and on May 24, 1977 submitted an affidavit to this Court requesting an extension of time within which to file his brief in response to the Brief for Appellant.

2. That your deponent was on trial in the companion case to this case and began to write the responsive brief the next day after the verdict (May 25, 1977)

3. That your deponent personally served the Assistant United States Attorney, Arthur A. Chalenski, Jr. on the afternoon of May 27, 1977 at his office in the United States District Court House, Syracuse, New York, and immediately thereafter mailed ten (10) copies of the brief to the Clerk of this Court.


James P. Shanahan
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Sworn to before me this 31st
day of May, 1977

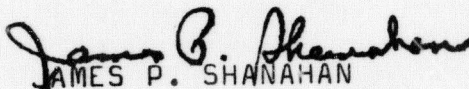

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sanction was enunciated and imposed respectively by
this Court in United States v. Marion 535 F2d 708.

CONCLUSION

For the reasons stated above the Order dismissing
the Indictment should be affirmed.

Respectfully submitted,


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